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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 FREDERICK W. RICHARDSON,

9 Plaintiff,

10 v.

11 UNITED STATES OF AMERICA, *et al.*,

12 Defendants.

Cause No. C20-0923RSL

ORDER OF DISMISSAL AND
GRANTING LEAVE TO FILE A
MOTION TO AMEND

13 This matter comes before the Court on the “United States’ Motion to Dismiss Pursuant to
14 Rule 12(b)(1).” Dkt. # 8. On August 27, 1991, plaintiff sustained an injury to his right knee
15 while working for the U.S. Postal Service. He filed a claim for benefits under the Federal
16 Employees Compensation Act (“FECA”), 5 U.S.C. § 8101 *et seq*, which provides that “the
17 United States shall pay compensation for the disability or death of any employee resulting from
18 personal injury sustained while in the performance of his duty” 5 U.S.C. § 8102(a). The
19 Secretary of the Department of Labor has the authority to administer the FECA program and has
20 delegated his authority to the Director of the Office of Workers’ Compensation Programs
21 (“OWCP”). Plaintiff filed this lawsuit under the Federal Tort Claims Act, asserting that OWCP
22 negligently handled his FECA claim for benefits in a way that violated his due process rights and
23 caused physical and mental injuries. The United States seeks dismissal of the claims for lack of
24 subject matter jurisdiction.
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27 ORDER OF DISMISSAL AND GRANTING
28 LEAVE TO FILE A MOTION TO AMEND - 1

1 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's
2 power to hear a case. As the party invoking subject matter jurisdiction of the federal court,
3 plaintiff bears the burden of establishing that the Court has the requisite power to grant the relief
4 requested. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
5 complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal
6 jurisdiction either on its face or as a matter of fact. "In a facial attack, the challenger asserts that
7 the allegations contained in a complaint are insufficient on their face to invoke federal
8 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations
9 that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v.*
10 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where, as here, defendant raises a facial challenge
11 to the sufficiency of the allegations, the Court assumes the allegations of the complaint are true
12 and draws all reasonable inferences therefrom in plaintiff's favor. *Wolfe v. Strankman*, 392 F.3d
13 358, 362 (9th Cir. 2004).

16 Having reviewed the memoranda, declarations, and exhibits submitted by the parties¹ and
17 taking the evidence in the light most favorable to plaintiff, the Court finds as follows:

19 More than a decade after his 1991 injury, plaintiff underwent a total knee arthroplasty.²
20 The surgery was authorized by OWCP and covered under FECA. Plaintiff developed significant,
21 constricting, and painful scar tissue in the joint (arthrofibrosis) requiring a number of
22 manipulations under anesthesia, all of which were authorized and covered. It was ultimately
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25 ¹ The Court has considered plaintiff's sur-reply, Dkt. # 16.

26 ² The pre-2016 history provided here is taken from the chronology plaintiff provided in
27 opposition to the motion to dismiss, Dkt. # 11 at 6-50.

1 determined that the arthroplasty had failed, and plaintiff underwent revision surgery in January
2 2016. Plaintiff did not obtain pre-authorization for the January 2016 surgery.

3 Plaintiff requested that OWCP add atrial fibrillation as an additional condition related to
4 the right knee injury.³ When that request was denied or ignored, plaintiff initiated a complaint
5 with his Congressional representatives. In responding to an inquiry from Senator Murray, OWCP
6 staff represented that they did not have a copy of his January 2016 request to add a condition to
7 his FECA claim. Plaintiff asserts that he had, however, sent the request and that he was
8 subsequently able to find it in OWCP's files marked received as of January 21, 2016. Plaintiff
9 alleges that the persons who claimed to be unaware of the January 2016 request to add a
10 condition "have shown no care or concern in their unethical act(s) that conspired to conceal and
11 or manipulate the known facts of the case" and that their conduct "denied claimant timely and
12 proper treatment, and denied him due process" as required by FECA. Dkt. # 11 at 27.

15 Meanwhile OWCP refused to pay bills related to the January 2016 revision surgery or to
16 authorize post-surgery physical therapy. When the medical services provider contacted OWCP
17 about outstanding bills, it was informed that the surgery had not been pre-approved and that
18 OWCP had asked a District Medical Director ("DMA") to review the case file. The DMA
19 determined that plaintiff's 2013 knee replacement surgery would have addressed his workplace
20 injury and that all subsequent problems were related to the arthroplasty itself, plaintiff's prior
21 knee surgeries, and/or his degenerative arthritis. Plaintiff believes the DMA's findings are
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25 ³ Plaintiff's physician believed that the atrial fibrillation "may have been [brought] on by the pain
26 and stress of [plaintiff's] knee surgery." Dkt. # 11 at 25. Plaintiff therefore believes the condition was
27 covered under FECA as a consequential injury resulting from a weakness or impairment arising from his
28 work-related injury.

1 inconsistent with the factual evidence in his claim file, contradict findings in the record, and
2 improperly discount the fact that the workplace injury materially aggravated his prior knee
3 problems. Plaintiff argues that OWCP violated his due process rights because it “did not prepare
4 a memorandum to the file/Director, no formal decision with appeal rights was issued and no
5 explanation of the change in accepted condition was provided the claimant” Dkt. # 11 at 30.
6 *See also Id.* at 32 and 38; Dkt. # 16 at 7.

8 When plaintiff requested that the January 2016 revision surgery be retro-authorized,
9 OWCP requested additional medical evidence from the surgeon in light of the DMA’s findings.
10 No additional evidence was provided, and OWCP denied the request for retroactive approval in
11 a letter dated August 19, 2016. Plaintiff was notified of his right to appeal the denial. The denial
12 was reissued, with slight modifications, on October 3, 2016. That denial was administratively
13 appealed. Based on an examination of the written record, the Branch of Hearings and Review in
14 Washington DC upheld the denial in March 2017, concluding that the January 2016 surgery was
15 not necessary or related to plaintiff’s August 1991 workplace injury. Plaintiff was notified that
16 he could seek reconsideration or further appeals. His request for reconsideration was not timely
17 made, however, and it was denied on the ground that plaintiff had failed to present “clear
18 evidence that the Office’s last merit decision was incorrect.” Dkt. # 9-3 at 12. Plaintiff was
19 notified that his only right of appeal lay with the Employees’ Compensation Appeals Board and
20 had to be filed within 180 days.

23 In May 2019, plaintiff requested authorization for on-going physical therapy treatments:
24 the then-current authorization was set to expire in July 2019. Neither plaintiff nor his doctor
25 submitted an updated treatment plan showing how continued treatment would produce some
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1 functional improvement. The request was denied because “the evidence of record does not
2 support that [physical therapy after July 6, 2019] is medically necessary to address the effects of
3 your work-related injury or conditions(s) under the FECA.” Dkt. # 9-4 at 3. Plaintiff initiated an
4 administrative appeal, and the denial was set aside and remanded for further medical
5 development to determine whether the arthrofibrosis necessitating physical therapy was
6 attributable to plaintiff’s workplace injury. A second examining physician opined that plaintiff’s
7 right knee arthrofibrosis was related to his workplace injury, but that physical therapy would not
8 provide any benefit. Two months after plaintiff filed this complaint, OWCP amended plaintiff’s
9 claim to include right knee ankylosis/arthrofibrosis to his list of accepted conditions. In light of
10 the conflict between plaintiff’s treating physician and the second examining physician regarding
11 the medical necessity of physical therapy, OWCP scheduled another examination with a referee
12 medical examiner on September 5, 2020. The third examiner sided with the second: OWCP
13 notified plaintiff on January 8, 2021, that his request for authorization for physical therapy was
14 denied and provided an explanation of his appeal rights.

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17 Plaintiff alleges that, because of OWCP’s refusal to authorize post-surgery physical
18 therapy and additional procedures designed to improve the functionality of his right knee, he fell
19 on stairs, causing additional injuries. In September 2018, plaintiff requested that the additional
20 injuries be added to his original claim as associated conditions. OWCP requested more evidence,
21 but did not respond to plaintiff’s supplemental submission. When plaintiff requested
22 authorization for surgery on his left shoulder in July 2019 (one of the associated conditions), he
23 received no response.
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26 FECA prohibits judicial review of OWCP benefit determinations. 5 U.S.C. § 8128(b)

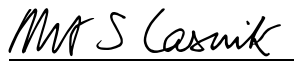
1 (“The action of the Secretary or his designee in allowing or denying a payment . . . is final and
2 conclusive for all purposes with respect to all questions of law and fact; and . . . [is] not subject
3 to review by . . . a court by mandamus or otherwise.”). Although the statute does not “take the
4 ‘extraordinary’ step of foreclosing jurisdiction over constitutional claims,” a claim of a
5 constitutional violation cannot be “insubstantial” and must “appear to be more than mere
6 allegations included in the complaint to create jurisdiction where none would exist otherwise.”
7 *Rodrigues v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985).

9 Plaintiff alleges that the opinions expressed by Dr. Richard Steinfeld in his May 4, 2016,
10 report were simply wrong, based as they were on an inaccurate description of plaintiff’s medical
11 history and contradicting prior findings that the 1991 workplace injury caused or materially
12 aggravated the accepted condition of internal derangement. Plaintiff alleges that the report
13 violated his due process rights because it changed the basis on which one of his conditions had
14 been accepted without notice and an opportunity to be heard: “No memorandum to the
15 file/Director was prepared, no formal decision with appeal rights was issued and no explanation
16 of the change in accepted condition was provided the claimant denying due process” Dkt.
17 # 16 at 7. The report itself worked no change on plaintiff’s list of accepted conditions or the
18 benefits he was then receiving, nor did it deny or approve a claim. Plaintiff had not obtained
19 authorization for the January 2016 surgery, and bills submitted for payment related to that
20 surgery continued to go unpaid. It was not until plaintiff requested that OWCP retroactively
21 authorize the January 2016 revision surgery that OWCP relied on the May 4, 2016, report. At
22 that point, a formal written denial was issued with notice of plaintiff’s administrative appeal
23 rights, which he pursued. Plaintiff does not identify any other process that was due in August
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1 2016 when the request for retroactive authorization was denied or show that he was entitled to
2 notice and an opportunity to be heard when Dr. Steinfeld issued his report in May 2016.⁴
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5 For all of the foregoing reasons, the Court finds that plaintiff's due process challenges to
6 OWCP's conduct are insubstantial as presently alleged. The Court therefore lacks subject matter
7 jurisdiction over plaintiff's claims because they challenge OWCP's "action . . . in allowing or
8 denying payment . . ." and are therefore barred. 5 U.S.C. § 8128(b). It may be possible for
9 plaintiff to allege a viable due process claim related to OWCP's failure to respond to his July
10 2019 request for authorization for left shoulder surgery, however. He may, within twenty-one
11 days of this order, file a motion for leave to amend with a proposed amended complaint for the
12 Court's review, in compliance with Local Civil Rule 15.
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15 Dated this 21st day of June, 2021.

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17 Robert S. Lasnik
18 United States District Judge
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25 ⁴ Plaintiff's other allegations regarding negligent claims handling, negligent communications
26 with elected officials, and the denial of his request for physical therapy authorization do not state a due
27 process claim.